

BEFORE THE FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In The Matter of the Application of

HERBERT L. SCHOENBOHM

Kingshill, Virgin Islands

For Amateur Station
and Operator Licenses

WT DOCKET NO. 95-11

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**MOTION TO DISMISS HEARING DESIGNATION ORDER OR IN THE
ALTERNATIVE HOLD THE ACTION IN ABEYANCE UNTIL THE
LEGALITY OF THE CONVICTION NOW BEFORE THE DISTRICT COURT,
WHICH THE FCC HEARING ACTION IS BASED UPON, CAN BE
DETERMINED.**

COMES NOW licensee Herbert L. Schoenbohm, pro-se and moves
for dismissal of this proceeding or in the alternative to
hold the action in abeyance for the following reasons:

- (1) The judgement and commitment of Herbert L. Schoenbohm in
United States v. Schoenbohm 91-108 D.V.I to one count of
violation of Title 18 U.S. Code subsection 1029 (a) (1)
was vacated by on December 30, 1992 and was not been
reinstated as a federal conviction.
- (2) The Defendant has petitioned the court for the
consideration of a comprehensive writ of habeas corpus
based, inter alia, that the conviction represents a
violation of the U.S. Constitution as the;
 - (a) Indictment did not charge a crime under the statute
as it did not allege an affect on interstate commerce
or allege an actual account access or account debit
as required by statute. United States v. Akpi, 993
F.2d 229 (4th Cir. 1993) (per curiam) (failure to
allege an affect on interstate commerce as an
essential element) and U.S. v. Brady, 13 F. 3rd 334
(10th Circuit 1993) (failure to allege an account

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access of a billable subscriber account)

- (b) The insufficient indictment lacking essential elements resulted in a jury charge that created an un rebuttable presumption thus depriving the Defendant his Constitutional right to a trial by a jury deciding all the essential elements of the offense. In re Winship, 397 U.S. 358 (1970); Also see, Sandstrom v. Montana, 442 US 510 (1979)
 - (c) The Government knowingly used false evidence to obtain the Defendant's conviction which was recognized by the Third Circuit Court of Appeals. As the result of a post appeal FOIA release the materiality of the knowing use of false evidence to the remaining count can now be established and fraud on the court by the government can now be proven.
 - (d) The judgement to the remaining count was entered on December 31, 1992 as a Virgin Island Territorial judgement with a changed caption a the Government of the Virgin Islands v. Herbert L. Schoenbohm. The offense for which the Defendant was charged is not cognizable under the laws of the United States Virgin Islands and as such the territorial judgement represents a constitutional violation. The Territorial Government of the United States Virgin Islands has not litigated against the Defendant. The defendants habeas writ thus secures relief from an illegal conviction, an illegal judgement, and an illegal order of confinement. The Territorial judgement on its face alone is nugatory.
- (3) The Commission's hearing designation order is erroneously based on the denial of a direct appeal wherein various issues such as Brady and Giglio violation were decided apart from the collateral and plain error issues now being considered. This litigation may make moot the present nexus for the Commission's action.
- (4) The Commission's designation order incorrectly cites Title 18 U.S. Code Subsection 1029 (a) (1). The significant part of the statute should read"shall, if the offense affects interstate or foreign commerce, be

punished as provided..." The error by the government at trial and the Commission in this action, of substituting "use in interstate commerce" rather than "affect on interstate commerce", is material to the proceeding because it demonstrates that the Defendant was convicted on a charge that was neither alleged in the indictment nor presented to the jury at trial. This action "offends the most basic notions of due process."

Dunn v. United States, 99S Ct. 2190, (1979)

- (5) Whereas the designation order cites a Commission ruling initiated in 1990 which allows the action to cover non-broadcast licensees, (5 FCC Red 3252, 3253 (1990) and whereas the licensee was convicted for conduct that allegedly took place in 1987, accordingly the action of the Commission against the licensee would create the imposition of punishment retroactively, in violation of the U.S. Constitution.
- (6) Whereas the Commission's hearing designation order cites the requirement that the licensee has the burden of proof of establishing that the renewal of his license would be "in the public interest, convenience, and necessity." Accordingly 47 C.F.R. Part 97.1, entitled "Basis and Purpose" lists five principles for the amateur service licensee and none require that an amateur service licensee be "in the public interest, necessity, and convenience." Accordingly the criteria established in the hearing designation order requires the licensee the

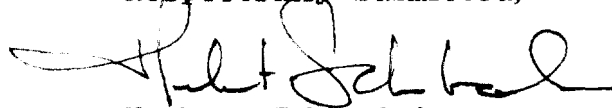
burden of proof of criteria not necessarily applicable to amateur radio service licences. Requiring the licensee, in the instant matter to meet a burden other amateur licensees are not subjected to, is a arbitrary and possibly capricious exercise of bureaucratic power.

The Commission's action is clearly based on a prima facie nullity. Additionally, the Commission's reliance on a criminal conviction that was obtained by violation of the law and contrary to basic constitution guarantees would compound the injustice and will most likely result in additional litigation.

The Commission is urged to dismiss the action or hold the hearing designation order in abeyance until the present habeas action are decided in the District Court and Territorial Court of the Virgin Islands, as they may render moot the Commission's present proceeding.

Date: March 20, 1995

Respectfully Submitted,

A handwritten signature in black ink, appearing to read 'Herb Schoenbohm', with a stylized flourish at the end.

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